85-741 (1)

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LEFORD T. DAVIS; LEROY S. AIKEN; WILLIAM C. BLAND; ALFRED FRANKLIN SMITH; On Behalf of themselves and all others similarly situated,

Petitioners

versus

BETHLEHEM STEEL CORPORATION; UNITED STATES STEELWORKERS OF AMERICAN, AFL-CIO-CLC, LOCAL 2609; UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, LOCAL 2610; UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC.

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether new filing class representatives may claim statute of limitations tolling benefits under the principles of American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974), for broad pattern and practice charges of racial discrimination against an employer and labor unions which were set forth in the original action, where the original class representatives did not include their individual claims in their judicial complaint, and thus failed to give express notice of such individual claims to the defendants in the original class action?

2. And secondly, may such new filing class representatives claim the benefit of American Pipe tolling principles for individual claims of psychological and associational injury, on the basis that such claims reasonably stem from the class claims that were set forth in the original class action (i.e., that constructive notice of such individual injuries was thus given in the original class action to the defendants)?

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on August 7, 1985.

OPINIONS BELOW

The August 7, 1985 opinion of the Court of Appeals for the Fourth Circuit whose judgment is herein sought to be reviewed (Davis, et al v. Bethlehem Steel, et al., No. 85-1153) is not yet published but is reprinted in the separate Appendix to this Petition, p.p. 1-10. The prior opinion of the United States District Court for the District of Maryland, also reprinted in the Appendix, p.p. 11-52, is reported as follows: Davis v. Bethlehem Steel Corp., 600 F.Supp. 1312 (D.Md., 1985).

JURISDICTION

The judgment of the Court of Appeals was entered on August 7, 1985. The jurisdiction of this Court is invoked pursuant to 28 USC §§1254(1), and 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of two

Federal statutes, i.e., 42 U.S.C. §§2000e, 5(f)(1), and 42 U.S.C. §1981 respectively. The specific question involved in these statutes is a question relating to their statute of limitations, and the notice requirement for the tolling of these statutes by the filing of a plaintiff class action lawsuit, under the tolling provisions of American Pipe and Construction Company v. Utah, supra, and Crown, Cork and Seal, v. Parker, ____ U.S. ____, 103 S. Ct. 2392 (1983). The statutes concerned are set forth in the Appendix at p.p. 53, 54, infra.

STATEMENT OF THE CASE

a. The Decision of the Trial Court.

The procedural history of the case, as outlined in the trial court's Memorandum and Order of January 3, 1985, reveals that the present case related directly to Lane v. Bethlehem Steel, et al., M-71-580, which was filed in 1971 in the United States District Court for the District of Maryland by 41 named black plain-

tiffs who charged the defendants with 37 broad pattern and practice charges of racial discrimination against 6,000 black employees at the company's Sparrows Point, Maryland facility, all of whom were members of Locals 2609 and 2610 of the Steel Workers' Union during the period 1967-1971. (The operable period of this case was between 1967-1974.) Appendix 12-14.

As noted in the trial court's Memorandum and Order (Appendix 12, 13), the 1971 named plaintiffs in the Lane case did not set out in their complaint a statement of their individual charges of discrimination, or state how the various class charges of discrimination which were set forth in the complaint personally harmed or aggrieved each of the named plaintiffs. Instead, the trial court observed that although the plaintiffs in Lane had twice amended their complaint, they still failed to set forth how they were individually harmed, and in their 1971 action had simply "laundry listed" "virtually every conceivable type of discriminatory employment practice." In denying the motion for class certification in the 1971 case the trial court

ruled that this failure was fatal to class certification. (See Appendix 12, 13). Following the denial of class certification the 41 named plaintiffs in the Lane case settled their "individual" complaints with the defendnats, and the Davis appellants who were putative members of the Lane class intervened to appeal the denial of class certification in the Lane case. The Fourth Circuit eventually affirmed the denial of class certification in the Lane case. See, Adams v. Bethlehem Steel, 736 F.2d 992 (4th Cir. 1984).

The named plaintiffs in Davis, however, during the pendency of the Lane (or Adams) appeal, timely filed a new action against the defendants (Bethlehem Steel and the Steel Workers Unions) in 1982, under the statute of limitations tolling provisions of American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) and ultimately under similar provisions of Crown, Cork and Seal v. Parker, supra. The Davis complaint was patterned after the Lane complaint. All of the class charges that were set forth in Davis were taken from the Lane complaint — including the time frame of the

Lane charges. The Davis complaint, however, did not repeat every class charge that was set forth in Lane. Another difference between the Lane and Davis complaints — and a most significant difference — lay in the fact that the Davis complainants set forth in Davis how they were individually aggrieved by the existence of the various pattern and practices of discrimination set forth in Davis, i.e., that such practices had so polluted their work place (during the period 1967-1974) as to cause them "inconvenience...depression, isolation from and denial of association with the preferred group, humiliation and a denial of psychological well being."

But as noted above the named plaintiffs in Lane failed to state how the 37 broad patterns and practices of discrimination charged in the Lane complaint had individually aggrieved them. The trial court in Davis thus ruled this was a fatal omission insofar as the Lane charges were concerned vis-a-vis effecting the tolling principles of American Pipe. Specifically, the Davis trial court ruled that where individual claims

were not set forth in the pleading by the original class representatives, new filing representatives could not rely on American Pipe tolling principles to protect their individual claims, nor could any other members of that class. Appendix 26-28. The trial court further ruled, at Appendix 27, 28, that the class action lawsuit in this case thus presents the "rare situation" where the class action "did not provide notice to the defendants of the substantive claims being brought against them," and if the notice requirement of American Pipe is to have effective application, "it must be applied when class representatives make no specific allegations of injury."

The trial court then ruled that the 1967-1974 individual claims of the Davis plaintiffs were barred by the statute of limitations. Appendix 35, 41. At Appendix 41, 42 the trial court addressed the class action issue, and held that as each member of the Lane class was barred from claiming American Pipe tolling as to their individual claims, all such class members were barred from representing the class. The court specifi-

cally noted that as each member of the putative class "who is brought forward would (thus) face the argument that Lane provided the defendants with no notice of the individual's claim," and as such, no member of the class could represent the class. The trial court concluded, at Appendix 42, "(t)herefore, the putative class action brought herein is not protected from a limitations defense by American Pipe tolling," and the Davis class action accordingly "must be viewed as a new class action filed in November, 1982."

Absent American Pipe tolling, the trial court noted a new class representative "whose claims accrued on or after November, 1979" would have to allege a "continuing violation" in order to bring the 1967-1974 class claims into the action. Appendix 46. The trial court at Appendix 47 found that a continuing offense theory was not alleged in Davis, and as such any new class claimants would have to address only "fresh" claims--i.e., those claims accruing on and after November, 1979. Appendix 47-49. The trial court accordingly, gave the plaintiffs an opportunity to present

a new class claimant, for "fresh" claims. The Davis claimants declined to do so, and the trial court dismissed all claims, both individual and class. See Appendix 50, 51.

b. The Decision of the Court of Appeals.

On appeal to the Fourth Circuit the Court of Appeals affirmed the ruling of the trial court. The Fourth Circuit reviewed the fourteen year history of this case, and noted that the Davis plaintiffs' allegations "were confined to events occurring between 1967 and 1974," and as such, the class representatives were relying on American Pipe and Crown, Cork and Seal to keep the pre-1974 claims alive until the new Davis class action was filed during the Lane appeal in 1982. The Fourth Circuit ruled that the sole question on (the Davis) appeal was whether the applicable statutes of limitations were tolled during Lane's pendency in trial and on appeal. (Appendix 5). The Court of Appeals further noted that the Davis class representatives claimed at trial and on appeal that the defend-

ants received constructive notice (under American Pipe from the Lane proceedings) that the plaintiffs had suffered psychological and associational injuries at their Sparrows Point facility. (Appendix 5).

The Fourth Circuit did not further discuss the element of "constructive notice" but proceeded to hold that the Lane plaintiffs did not give "fair notice" to the defendants of their class action as they "did nothing to substantiate their individual claims by offering specific allegations of harm suffered by them." (Appendix 9). The Court of Appeals further held that the Lane plaintiffs not only did not set forth their individual injuries in the Lane action, but "failed to indicate any instance of discrimination" and instead relied solely "on generalized allegations (of) employment practices." (Appendix 10). The Fourth Circuit ruled accordingly, that this did not meet the "fair notice" requirements of American Pipe and Crown, Cork and Seal, as it did not "adequately notify the defendants of the substantive claims against them". Accordingly, the Fourth Circuit affirmed the holding

of the district court in dismissing both class and individual claims in the Davis action. (Appendix 10).

c. The Rationale of the Holdings.

While it is clear that the trial court and the Court of Appeals dismissed the individual claims of the Davis plaintiffs (whether rightly or wrongly) because the Lane defendants were not given "fair notice" of individual claims in Lane, it is more difficult to follow the rationale of the two courts in dismissing the class aspects of the Davis case on this same basis (i.e., because no individual claims were set forth in Lane). In the latter regard, it must be noted that the Davis class charges were admittedly based on identical class charges that were set forth in Lane. There is no dispute that the Lane (and in turn, the Davis) defendants were thus given written notice of all Davis class charges in the Lane complaint.

The trial court quite appropriately cited Rose v. Arkansas Valley Environmental and Utility Authority, 562 F. Supp. 1190, 1193 (W.D.Mo. 1983), for the pro-

position that in deciding whether American Pipe tolling principles apply to new actions alleging individual claims "the appropriate focus of inquiry should be upon the extent and character of the notice of the later individual claims which the defendant actually received from the class action." (Appendix 24). The trial court's next conclusion, set forth at Appendix 25, that "(i)t is the named plaintiffs' claims which define the parameters of the class action" is likewise true (as applied to typicality principles).

But the trial court's conclusion at Appendix 26, that the individual claims of named plaintiffs "whose suit is relied upon to toll the statute of limitations" must have been set forth in the pleadings "sufficiently clearly to establish the specific parameters, at least arguably, of the class claims," is logically quite wide of the mark. "Arguably" the fair notice of the class claim, it is submitted, is accomplished by the written content of the class charge that is set forth in the original class action. Its parameters or outter edges would include or should include all of the various

injuries that the defendant knew or through the exercise of reasonable knowledge, should have known could reasonably stem from it (i.e., constructive knowledge). Neither trial or appellate court addressed the issue in this context, and thus both courts concluded simply that in the absence of individual claims, no notice of class claims was given at all.

Assuming the defendant company and labor unions involved had a reasonable grasp and understanding of things pertinent to their respective stations in life, and could read the English language, it is then difficult to understand why they were not given "fair notice" of all class charges expressly set forth in the Lane complaint (and, as will be pointed out in a subsequent section, constructive knowledge or notice of all injuries that could reasonably flow from the various class allegations that were expressly set forth in the complaint). It was the failure of the trial court and appellate court to either face or consider the issue in this context that makes it quite impossible to follow the logic or rationale of the courts' respective rulings

on the subject of class claims vis-a-vis the fair notice factor of American Pipe tolling requirements.

REASONS FOR GRANTING THE WRIT

a. As to the Dismissal of the Class Charges.

It is submitted that the rulings of the trial court and the Fourth Circuit in this case were flatly wrong. Tying the question of American Pipe's notice requirements to individual claims of class representatives, as opposed to the class claims of those representatives strikes at very heart of the doctrine of judicial economy identified in American Pipe as the basis for its holding that a filing of a class action tolled the statute of limitations for the claims of individual members. As individual claims of unnamed class members may reasonably vary it might well be impossible in the great majority of cases to expect the original class representative to include in the original class action all of the various individual claims that might possibly stem from a single or multiple employment

practice or policy set forth in a class claim. In such situations, it is submitted, where a class representative does not list all the claims of all possible members, or where the claims of the unnamed class members arise out of the same class violation set forth in the complaint, but differ from the named plaintiff's individual claim in manner or degree of specific injury, such unnamed members would accordingly be forced to intervene or to file new claims of their own in order to protect their interests during the pendency of the original class action. Such claims, depending on the type of the class action, could reach well into the thousands, if not millions.

Thus, while a named plaintiff may not represent persons whose injuries resulted from employment practices different in kind or origin from those to which the named plaintiff was subjected, he may represent unnamed class members whose injuries resulted from the same employment practice of which he was aggrieved,[1] and which "concern the same evidence, mem-

[1] See International Woodworkers v. Chesapeake

ories, and witnesses as the subject matter of the original class suit."[2] An example of such a situation, it is submitted would be where a named black plaintiff charged his employer with a pattern denial of promotion to better paying jobs to black employees and charged that pursuant to this pattern he individually was denied promotion to foreman. Such an employee could thus represent other black employees who were denied promotion by the same pattern of employment discrimination, as well as those who suffered other injury because of the same pattern.

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[1] (con't) Bay Plywood Corp., 659 F.2d 1259, 1269-70 (4th Cir. 1981): "While it is true that a named plaintiff may not represent persons whose injuries resulted from employment practices different in kind or origin from those to which the plaintiff was subjected...where the interests of the representative plaintiff coincide with those of the class members, (r)ule 23 does not require precise, mirror-image identity respecting the injuries caused by a single practice of a single facility...Obviously, a single, unitary policy of disparate treatment might not injure every effected person in exactly the same manner or degree (but that) need not preclude certification, at least on a conditional basis."

[2] See Mr. Justice Powell's concurring opinion, Crown, Cork and Seal, supra, ____U.S.____, 103 S.Ct. 2398.

Hence, in the just quoted situation the named plaintiff might reasonably represent black employees who were so intimidated by the employer's pattern and practice of denial of promotion to black employees that they simply gave up and ceased to apply for promotion or other job opportunity because of the certainty of rejection.[3] The same named plaintiff could thus represent a second group of black employees who were psychologically injured by the employer's promotion practice--i.e., those who suffered a loss of self-confidence or self-esteem because of their employer's (and union's) polution of the work force to the point that they performed poorly at work, or had a nervous breakdown, or were so depressed by the promotion policy involved that they became alcoholic, or drug abusers, or lost their families, or lost incentive to strive for better opportunities at work, etc.

Black employees, in the above example could also suffer other injuries because of the existence of

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[3] Teamsters v. United States, 431 U.S. 324 (1977).

the employer's promotion discrimination. The promotion policy, for example, could polarize the employer's work force along racial lines and hence black employees could suffer a host of injuries because of the denial of association with white workers.[4] Thus, black workers might not learn essential facts or knowledge of their trade because white workers with such knowledge would not associate with them, or talk to them or take time to show them how to work certain machines or certain instruments, etc. Black workers could be denied knowledge of work opportunities that were passed along by word-of-mouth, simply because the employer's promotion policy had so polarized the work force that white workers would not associate or converse with black workers and vice versa.

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[4] While denial of association and psychological injury might well involve intangible interests, this Court has recognized such interests as meeting constitutional standing requirements. Sierra Club v. Morton, 405 U.S. 727, 734 (1972). This Court has also construed the meaning of the term "person aggrieved" contained in §810(a) of the Fair Housing Act, 42 U.S.C. §3610, to include "any person who claims to have been injured by a discriminatory housing prac tice," and as such a white person claiming to be aggrieved by a housing authority on the basis of "the loss of important bene-

Hence, while a named plaintiff may represent unnamed class members who have been injured by the same employer inflicted policy that injured him, the various injuries need not be tangible injuries, nor need they be mirror-image reflections of each other. It is sufficient if they arose from the same employment pattern, and the interests of the named plainitffs "coincide with those of the class members" (International Woodworkers, supra); and if they are "fairly encompassed by the named plaintiff's claim" (General

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[4] (con't) fits from interracial associations," had standing to file a class action against a housing authority for the benefit of black persons. See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). Psychological injuries and associational injuries have also been recognized as viable injuries under Title VII. See e.g., Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976); Rogers v. Equal Employment Opportunity Com- mission, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Bundy v. Jackson, 24 F.E.P. Cases 1155, 1160-61 (D.C. Cir. 1981); Firefighters Institute for Racial Equality v. City of St. Louis, et al., 549 F.2d 506, 514 (8th Cir. 1977); U.S.A. v. City of Buffalo, 457 F.Supp. 612 (W.D.N.Y. 1978). Also see EEOC v. Mississippi College, 23 F.E.P. Cases 1501, 1505 (5th Cir. 1980); Bartelson V. Dean Witter Co., 24 F.E.P. Cases 3657 (E.D. Pa. 1980); EEOC v. McLeniore Food Stores, 25 F.E.P. Cases 1356, 1357 (W.D. Tenn. 19).

Electric Co. of the Northwest v. E.E.O.C., 446 U.S. 318, 330 (1980).It is submitted here that the interests of class members are "fairly encompassed" by and "coincide" with those of a named plaintiff where the individual injuries of the named plaintiff and the unnamed members of the class arise from the same illegal employment pattern of the defendant.

Accordingly, it would follow that while a class plaintiff in filing his class complaint would list the class claim or claims of which he is complaining, and he would list his own individual claim that stems from the class claim, or certainly should do so, but it does not follow that he would list or attempt to list the various individual claims of all possible class members that could flow from or stem from the class violation. First, the named plaintiff would not know all of the individual claims of possible class members. Secondly, where the named plainitff claims some three dozen class claims or employment pattern and practice violations of an employer hiring thousands of possible class members, a named plaintiff's ability to list the indivi-

dual claims that stem from the various class violations would even be more limited if not impossible. Lastly, neither case law nor practice under Rule 23 requires or even suggests that a class plaintiff list the individual claims of unnamed class members in his complaint. Case law is not uniform that a named plaintiff even list his own individual injury in his class complaint.[5]

Accordingly, it is submitted that the gravamen of the requirement for fair notice to the defendant under American Pipe relates to the class charge involved, and not to the specific claims of individual class members. It is submitted that the finding of the trial court and the Fourth Circuit to the effect that no notice under American Pipe concepts was given to

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[5] For example, see Graniteville Company v. EEOC, 438 F.2d 32 (4th Cir. 1971) where the Fourth Circuit, in a suit to enforce an EEOC supoena, ruled that a plaintiff who charged his employer with broad pattern and practice charges of racial discrimination, need not have claimed that the policy was applied to him in a specific instance. Graniteville, 438 F.2d, 37. Also see, Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976), where the D.C. Circuit held that a

the defendants involved here because the named plaintiffs in Lane failed to list their individual claims in their class action complaint, was totally in error, and in flat contradiction to the standard announced in American Pipe. It is further submitted that fair notice of the the Davis class actions was given to the defendants in the Lane complaint, as every class practice charged in Davis was taken directly from the Lane complaint.

b. As to the Dismissal of the Individual Charges.

It is submitted that the dismissal of the Davis

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[5] (con't) named plaintiff in order to have standing to sue need not list his individual injury in a class action where the plainitff was complaining of hiring discrimination even though he himself had been hired, but could on remand amend his pleading to allege that even though he was hired the execution of the hiring discrimination policy against other blacks adversely effected his psychological well being. Greyhound Lines, East, 545 F.2d, 173). (It would thus appear that Greyhound Lines, East also includes the legal premise that a judicial complaint of hiring discrimination would constructively include, or would constructively notify a defendant of the possible existence of pschological damage to employees who were adversely affected or knowledgeable of the hiring discrimination.)

representatives' individual claims because individual claims were not set forth in Lane was absurd. As seen, American Pipe notice requirements are directed at class charges--and not at individual charges. It should also be observed, in regard to fair notice requirements, that the class charges in Lane consisted of some thirty-seven pattern and practice charges ranging from initial hiring and job assignment discrimination, to the entrenched maintenance of segregated job departments, with better paying jobs reserved for white employees; to denying black workers promotion to higher paying jobs, to craft jobs, and supervisory, management and executive jobs; to discriminating against blacks as a matter of policy on privileges, working conditions and overtime; of harrassing blacks who spoke out against the system; to discriminating against blacks on health and safety standards, retirement pay and vacation privileges; and to a charge of failure to act by the union defendants despite their overall knowledge of these practices by

the employer.[6]

Accordingly, it is submitted it would be impossible to read this long listing of class charges in Lane, without concluding that the 6000 plus black workers at the defendant's Sparrows Point, Maryland, facility could also have reasonably suffered psychological and associational injuries over the years involved because of the imposition of the racially polarizing policies in question. From another context it is clear that the psychological and associational injuries listed as individual injuries by the class representatives in the Davis complaint, reasonably stem from or result from the class employment practices specificially listed in the Lane complaint, and as such, arise from those practices and thus "concern the same evidence, memories and witnesses as the subject matter of the original class suit." (See Mr. Justice Powell's concurring opinion in Crown, Cork and Seal, supra, ____U.S.____, 103

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[6] These class charges were listed in the Fourth Circuit's holding. See Appendix 7, 9.

S.Ct., 2398; emphasis added.) It is submitted, accordingly, that constructive notice of such charges was given to the defendants by the filing of the Lane complaint. The action of the District Court and the Fourth Circuit in dismissing the individual claims of the Davis class plaintiffs was accordingly not warranted under the tolling prinicples of American Pipe and Crown, Cork and Seal, and as such was in contradiction to the prior rulings of this Court and various Circuits that expressly recognize the right of plaintiffs to bring psychological and associational claims in federal courts, etc.

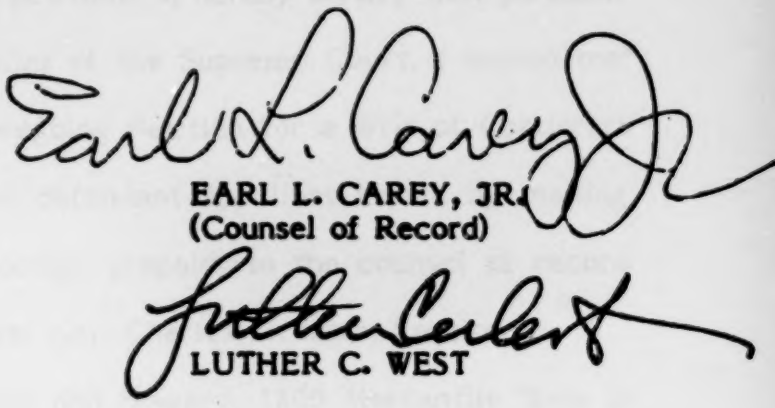
In summation, it is submitted that the trial court's finding that this case presents the "rare situation" where an original class action doesn't furnish notice to the defendants of the parameters of the class action, is clearly erroneous. It is submitted that the lower courts in this case grossly misconstrued basic concepts relating to fair notice set forth by this Court in American Pipe and Crown, Cork and Seal.

Moreover, the holding of the lower courts in this case were murky in setting forth the reasons why notice requirements were not met in this case, particularly as to the class charges in Davis which were almost exact duplicates of similar class charges in Lane. A finding by the lower courts that the Lane plaintiffs did not include their individual charges in the Lane complaint would hardly justify their finding that the defendants were not given fair notice of the class charges which were expressly set forth in Lane.

The appellants have argued that a listing of class charges is all that is involved in American Pipe and Crown, Cork and Seal notice requirements, and that individual charges (whether or not expressly included in the original pleading) that reasonably stem from such class charges are constructively within such charges, and, accordingly, are included within the tolling principle of the two cases involved. Certiorari is necessary, therefore, to resolve the misapplication of American Pipe and Crown, Cork and Seal, by the trial court and the Court of Appeals in this regard.

CONCLUSION

Wherefore, for the reasons stated, petitioners respectfully pray that a writ of certiorari be granted.



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LUTHER C. WEST

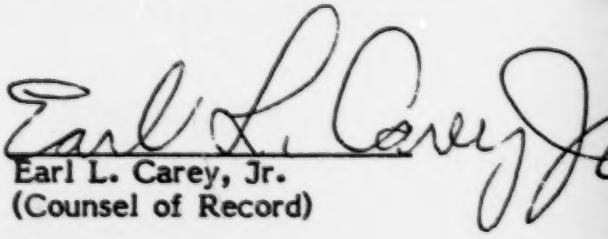
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CERTIFICATE OF SERVICE

I, Earl L. Carey, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for the petitioners, hereby certify that pursuant to Rule 33, Rules of the Supreme Court, I served one copy of the foregoing Petition for a Writ of Certiorari on each of the defendant appellees herein by mailing said copies, postage prepaid, to the counsel of record for such parties--i.e., Charles M. Kerr, Esquire, Venable, Baetjer and Howard, 1800 Mercantile Bank & Trust Building, Two Hopkins Plaza, Baltimore, MD 21201, counsel for Bethlehem Steel, and to Jeremiah A. Collins, Esquire, Bredhoff and Kaiser, Suite 1300, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036, counsel for the labor union defendants--on this 30th day of October, 1985.

All parties required to be served have thus been served.



Earl L. Carey, Jr.
(Counsel of Record)

APPENDIX

(PUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1153

Leford T. Davis; Leroy S. Aiken; William C. Bland; Alfred Franklin Smith, On behalf of themselves and all others similarly situated,

Appellants,

versus

Bethlehem Steel Corporation; United Steelworkers of American, AFL-CIO-CLC, Local 2609; United Steelworkers of America, AFL-CIO-CLC, Local 2610; United Steelworkers of America, AFL-CIO-CLC,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge. (CA 82-3255).

Argued: June 4, 1985 Decided: August 7, 1985

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and GORDON, United States District Judge for the Middle District of North Carolina, sitting by designation.

Luther C. West (West, Carey, Frame and Barnstein on brief) for Appellant; Jeffrey P. Ayres; Jeremiah A. Collins (Charles M. Kerr; Venable, Baetjer and Howard; Bredhoff and Kaiser; Bernard Kleiman; Kleiman & Whitney; Carl B. Frankel; Robert M. Weinberg; Michael H. Gottesman; I. Duke Avnet; John H. Price on brief) for Appellee.

SPROUSE, Circuit Judge:

Leford T. Davis, Leroy S. Aiken, William C. Bland and Alfred T. Smith (hereinafter Davis) brought this action against Bethlehem Steel Corporation (Bethlehem) and Locals 2609 and 2610 of the United Steel Workers of American (the Unions) alleging racial discrimination violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1982), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982). The action was filed in November 1982, although all the alleged discriminatory actions occurred prior to 1974.

Davis, however, contends that the applicable statutes of limitations were tolled under the principles of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), and Crown, Cork & Seal v. Parker, 452 U.S. 345 (1983). We agree with the district court that the prerequisites for tolling under American Pipe and Crown are not present in this case.

The employment practices involved in this suit have been in litigation for over fourteen years. A class action was originally filed in 1971, styled Lane v. Bethlehem Steel Corp., Civ. Action No. M-71-580 (D. Md. May 4, 1981), aff'd sub nom. Adams v. Bethlehem Steel Corp., 736 F.2d 992 (4th Cir. 1984). In it the forty-one named black plaintiffs alleged thirty-seven broad pattern and practice charges of discrimination against 6,000 black employees at Bethlehem's Sparrow point, Maryland, plant. The district court in that case denied class certification because the named plaintiffs alleged no injuries to themselves. The named individuals in that suit then settled their claims. Additonal



individual plaintiffs were allowed to intervene, however, for the limited purpose of appealing the court's refusal to certify the class. This court affirmed the trial court in Adams v. Bethlehem Steel, 736 F.2d 992 (4th Cir. 1984), aff'g Lane v. Bethlehem Steel Corp., Civ. Action No. M-71-580 (D. Md. May 4, 1981). Davis then brought this class action in 1982 alleging again many of the same charges contained in the Lane action and also alleging that he had individually suffered from racial discrimination and had been denied the benefit of a working environment not charged with racial discrimination, thereby suffering "humiliation, intense mental anguish, emotional and physical distress and great economic harm." All of these allegations were confined to events occurring between 1967 and 1974.

The trial court dismissed the complaint because it was time-barred, but granted Davis the right to amend and allege any continuing violations or new discriminatory acts occurring within the applicable time limits. Davis declined, asserting reliance solely

on the allegations of discrimination occurring prior to 1974. Relying on American Pipe and Crown, Davis contends that the 1971 Lane complaint kept the claims alive until 1984 when we affirmed in Adams the district court's refusal to certify the class. The sole question on appeal is whether the applicable statutes of limitations were tolled during Lane's pendency in the trial court and on appeal. Davis contended below and contends on appeal that Bethlehem and the Unions received notice sufficient for tolling under American Pipe from the Lane proceeding. He argues primarily that although the Lane allegations were quite nonspecific, Bethlehem and the Unions should have been placed on "constructive" notice that the plaintiffs had suffered psychological injuries and were denied the benefits of association with white workers at the plant.

In American Pipe, after the district court had ruled that a federal antitrust suit could not proceed as a class action, putative class members moved to intervene in the named plaintiffs' individual action. The

individual action. The Supreme Court ruled that the claims of the intervenors were not time-barred, holding that the statute of limitations was tolled by the filing of the class action as to all members of the putative class who made timely motions to intervene after the denial of class certification. 414 U.S. at 552-53. In Crown, the Supreme Court, in affirming this court's decision in a Title VII case, held the same tolling principle to apply to all putative members of the class whether they subsequently chose to intervene or to bring a separate individual action. 462 U.S. at 353-54. The Supreme Court in both American Pipe and Crown emphasized the necessity of reconciling the policies for permitting class actions with policies underlying statutes of limitations generally. In outlining these policies and their interrelationship, Justice Stewart, in American Pipe, said:

> This rule is in no way inconsistent with the functional operation of a statute of limitations. As the court stated in Order of Railroad Telegraphers v. Railway Express Agency, statutory limitation periods are "de-

> signed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." The policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.

414 U.S. at 554-55 (citations omitted).

The Davis plaintiffs concede the nonspecific nature of their Lane complaint, stating in their brief:

> (T) specific charges against Bethlehem Steel in the Lane complaint included a

"laundry list" of some 37 pattern and practice charges of discrimination. These charges ranged from initial hiring discrimination and job assignment discrimination where black employees were assigned to less preferable (sic) and lesser paid jobs, in all-black or nearly all-black departments and units, to the entrenched maintenance of such segregated departments and units by Bethlehem Steel. Bethlehem was alleged to have reserved its better paying jobs for white employees; of denying black employees fair promotion to better jobs, craft jobs, and supervisory, management and executive jobs. The employer was charged with not only refusing black employees better or more desirable jobs, or restricting blacks to lower jobs than whites but of discriminating against blacks on privileges working conditions and overtime, and of harrassing blacks who spoke out against the system. Bethlehem was further charged with discriminating against its 6000 black employees in Lane in the application of health and safety standards, in retirement pay, vacation privileges, and in failing to train black union representatives. The labor union defendants were charged in Lane with having knowledge

> of Bethlehem Steel's foregoing patterns of discrimination, and of doing nothing about these conditions.

Brief of Appellants at 7.

It is, of course, in the Lane complaint where we search for notice to Bethlehem and the Unions that the allegations of discrimination made in the instant case were being asserted against them in 1971. We agree with the district court that the requisite notice simply was not present. Nor have plaintiffs demonstrated that notice was given in subsequent discovery. As we indicated in Adams, the 1971 claims were not stated with the requisite specificity for certification of a putative class and the plaintiffs there did nothing to substantiate their individual claims by offering specific allegations of harm suffered by them. Instead, they proceeded on an "across-the-board" theory which they deemed sufficient to permit a named plaintiff who had suffered any injury to represent class members who had suffered completely different kinds of harm. In Lane, moreover, they not only failed to allege

any harm suffered by any individual, but they also failed to indicate any instance of discrimination relying solely on generalized allegations as to employment practices.

We cannot accept the appellants' contention that this is the "fair notice" contemplated by the Supreme Court in American Pipe and Crown. It does not adequately notify the defendants of the substantive claims against them, nor of the generic identities of the potential plaintiffs. To permit tolling in this instance would inflict upon the defendants the very "prejudice arising from claims for which [they] ha[ve] received no prior notice" which Justice Powell warned in Crown might flow from overly generous application of the rule of American Pipe. Crown, 462 U.S. at 355 (Powell, J., concurring) (quoting American Pipe, 414 U.S. at
562 (Blackmun, J., concurring)).

The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LEFORD T. DAVIS, et al.	*	
	*	Civil Action
v.	*	No. M-82-3255
BETHLEHEM STEEL CORPORATION, et al.	*	

MEMORANDUM AND ORDER

On Nove. .ber 9, 1982, four plaintiffs, Leford T. Davis, Leroy S. Aiken, William C. Bland, and Alfred T. Smith, filed a putative class action against Bethlehem Steel Corporation and United Steel Workers of America Local 2609 and Local 2610 alleging racial discrimination pursuant to 42 U.S.C. § 2000e et seq. and 42 U.S.C. §1981.

The defendants, Bethlehem Steel (Paper Nos. 17 & 22) and the unions (Paper No. 24), have filed motions to dismiss or for summary judgment and the plaintiffs have responded (Paper Nos 21, 25, 27). No hearing is necessary to decide the issues herein. Local Rule 6E.

Procedural History

This case relates directly to Lane v. Bethlehem Steel, M-71-580, in which this court denied the named plaintiffs' motion to certify 15 classes, holding that the plaintiffs had not met their burden under Fed. R. Civ. P. 23 (a) to show that a class or classes should be certified to litigate broad based, across the board, racial discrimination claims against Bethlehem Steel and the unions. See Lane, et al. v. Bethlehem Steel, et al., No. M-71-580, slip.op. at 5, 7 (D.Md. May 4, 1981) (Paper No. 17, Ex. E). After that ruling in Lane, the "parties informed the court of a tentative settlement resolving the claims of the named plaintiffs in Lane and the related cases."[1] Lane v. Bethlehem Steel, 93 F.R.D. 611, 613 (D.Md. 1982). On "October 14, 1981 the court approved the proposed settlement ... [and] final judgment for the defendants and against the plaintiffs was entered by the Clerk on October

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[1] Those related cases were Skates, et al. v. Bethlehem Steel,et al., M-76-1319; and Christian, et al. v. Bethlehem Steel, et al., M-76-1560.

28, 1981." Id.

On November 25, 1981, the four plaintiffs herein filed a motion to intervene in Lane for the purpose of appealing the denial of class certification, id. at 614, and that motion was granted. Id. at 619.

While that appeal was pending, the four plaintiffs herein, in November, 1982, filed the instant action. Bethlehem Steel filed a motion to stay or to dismiss the newly filed action (Paper No. 7) as did the defendant unions (Paper No. 8). The plaintiffs opposed those motions (Paper Nos. 10 & 14). Before this court formally ruled on the motion to stay, the Fourth Circuit affirmed the denial of class certification in Lane. Adams v. Bethlehem Steel, 736, F.2d 992, 994-95 (4th Cir. 1984).

The defendants argue that the instant action is barred by the statute of limitations. The plaintiffs have responded that their class based and individual claims are not time barred, relying to some extent on tolling principles which they argue are applicable because of the pendency of the Lane case and the sub-

sequent appeal.

To the extent that this court will rely on matters and materials outside the pleadings, the defendants' motions will be treated as motions for summary judgment. Fed. R. Civ. P. 56.

Legal Analysis

A) Do the tolling principles of American Pipe protect the individual claims set forth by the four named plaintiffs herein?

The plaintiffs contend that because "less than 30 days following the settlement/dismissal of the Lane, Christian and Skates law suits, the named plaintiffs... intervened to appeal the denial of class certification in Lane... the original tolling of the statute of limitations in the Lane case (as to both the 1981 and Title VII class aspects of that case) remain[ed] tolled until the Fourth Circuit rendered its decision on that appeal." (Paper No. 21 at 2).

In American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), the Court held "that the commencement of a class action procedure suspends the applicable statute of limitations as to all asserted

members of the class who would have been parties had the suit been permitted to continue as a class action."[2] Id. at 554. The Court explained the fairness of such a tolling rule on the grounds that the defendants had been notified by the filing of the original class action "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and the size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with intervenors." Id. at 555. The Court noted in passing that if claims not raised in the class action complaint were later presented to a court and limitations sought to be tolled, the latter court could impose conditions on the intervenors pursuant to Fed. R. Civ.

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[2] It is not disputed that the four plaintiffs herein were members of the putative class in Lane.

P. 23(d)(3). Id. at 555 n.25.

The Court further clarified the American Pipe decision in Crown, Cork & Seal v. Parker, ____U.S. ____, 51 U.S.L.W. 4746 (June 14, 1983), by stating that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or intervene as plaintiffs in the pending action." Id. at 4749.

The Court reiterated in Crown, Cork & Seal v. Parker that because the defendant there had notice of the substantive claims and generic identities of the potential class plaintiffs due to the filing of the class action suit, "[t]olling the statute of limitations thus creates no potential for unfair surprise, regardless of the method the class members choose to enforce their rights upon denial of class certification." Id.

Two considerations set out in American Pipe and its progeny provide the analytical framework with-

in which to determine whether the statute of limitations is tolled in this case. The first consideration is "aimed at protecting ... the vitality of the class action suit from a needless 'multiplicity of activity' [in the form of protective lawsuits].... [The second consideration focuses on] the integrity of the notice requirement underlying any statute of limitations." Comment, Class Actions and Statutes of Limitation, 48 U. of Chi. L. Rev. 106, 109 (1981).

The plaintiffs herein have chosen two routes to protect their rights. They first intervened in Lane to appeal the denial of class certification. As intervenors, they stepped into the shoes of the Lane class representatives, who did not participate in the appeal. The plaintiffs herein were unsuccessful in their appeal, the Fourth Circuit having affirmed in June, 1984, this court's denial of class certification in Lane.

The defendants argues that the pendency of the appeal would toll the statute of limitations only if the plaintiffs were successful on appeal. That argument has no merit. Acceptance of defendants' argument

would lead to a multiplicity of individual suits filed for protective purposes after the appeal was taken but before a decision were rendered by the Court of Appeals. American Pipe sought to prevent such a situation. See 414 U.S. at 551-53; see also Jiminez v. Weinberber, 523 F.2d 689 at 696 (7th Cir. 1975), cert. denied, 427 U.S. 917 (1976) (if the district court refused to certify the class "we think the tolling would have continued if the plaintiffs had appealed from such a ruling....").

As a practical matter, the affirmance of Lane's denial of class certification finally disposed of that case. The named plaintiffs in that action long ago settled their claims against the defendants and judgment was entered against them in this court. Although the plaintiffs herein sought leave to intervene in Lane to pursue their claims individually, this court denied that request and the Fourth Circuit affirmed the denial. Adams v. Bethlehem Steel, 736 F.2d at 995.

Failure on appeal to have the class certified or to be given leave to intervene individually in Lane

required these unsuccessful plaintiffs to initiate a separate lawsuit and to seek the application of American Pipe tolling provisions in the newly instituted suit. In fact, in Crown, Cork & Seal v. Parker, the Court stated that once class certification is denied, class members "may choose to file their own suits or to intervene as plaintiffs in the pending action." 51 U.S.L.W. at 4749. Because there is no "pending action" in which these plaintiffs could intervene, their only choice was to file a new action.

The plaintiffs, by filing the instant action in 1982, opened a second route to protect their rights - the filing of a "new action." It is a class action containing their individual and representative claims of racial discrimination.

Crown, Cork & Seal clearly established that the statute of limitations remained tolled for all members of the putative class until class certification was denied. 51 U.S.L.W. at 4749. The defendants argue that the tolling principle is not applicable in the instant action because Lane did not provide fair notice of the

instant plaintiffs' claims to the defendants.

To invoke American Pipe tolling, the prior class action pleadings must provide the defendants "with 'the essential information necessary to determine both the subject matter and size of the prospective litigation....'" United Airlines, Inc. v. McDonald, 432 U.S. 385, 392-93 (1977) quoting American Pipe, 414 U.S. at 555.

According to one commentator,

> "The notice issue may take two forms. In the first, the defendant would assert that the class claim was incomprehensibly vague. He may have received notice of the named plaintiff's claims within the statutory period, while having absolutely no idea what sort of class he was opposing. The defendant would thus claim that he was unable to determine 'both the subject matter and size of the prospective litigation' within the statutory period, and accordingly did not receive notice adequate to justify tolling the statute of limitations for any asserted class members. This problem could arise if the named plaintiff made a vague allegation of injury, and then claimed to sue on behalf of himself and all others similarly situated....
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> The second notice problem would

> involve only some class members. The complaint may assert a specific class, but some class subsequently may be revealed to have distinguishing characteristics that would substantially affect the defendant's case. The defendant thus would assert that he had been surprised by claims he was not prepared to defend against."

Comment, supra, at 113-14 (footnot omitted).

The defendants herein argue that the orignal class action claims in Lane were so vague that they provided little or not notice of the individual claims brought in the case at bar. This court's general observations regarding the Lane class action support that argument.

In denying class certification in Lane, this court stated:

> "First, although the complaint in this case has been twice amended to add parties and claims (Paper Nos. 1, 14 and 38), the plaintiffs have yet to set out in the complaint a statement of their individual claims of discrimination. Instead, the plaintiffs have simply 'laundry listed' virtually every conceivable type of discriminatory employment practice. Although the rules of pleading are to be applied

liberally, a party moving for class certification must do more than allege general categories of employment discrimination. See Rule 8(a)(2), Fed. R. Civ. P.; 3B Moore's Federal Practice ¶ 23.02-2 (2d ed. 1980). Cf. Belcher v. Bassett Furniture Industries, Inc., 588 F.2d 904, 906 (4th Cir. 1978).

Second, while it is true that a motion for class certification should not be determined solely upon the pleadings, and that the court should consider the moving party's legal memoranda and discovery materials, see King v. Gulf Oil Co., 581 F.2d 1184, 1186 (5th Cir. 1978), the plaintiffs' memorandum relating to the scope and composition of the proposed classes (Paper No. 182), does not indicate what claims the named plaintiffs intend to raise on their own behalf under either Title VII or section 1981. Consequently there is no basis for determining the propriety of the proposed classes and class claims. Simply referring to the named plaintiffs' EEOC charge and deposition testimony without specifying how these documents, and the information contained therein, relate to any substantive theories of discrimination, as the plaintiffs have done here, cannot substitute for the precise analysis contemplated by Rule 23(a). Significantly, most of the deposition testimony referred to by the plaintiffs concerns matters well beyond the reach of the applicable statutes of limitations. Moreover, the EEOC charges and the referred

> to deposition testimony are generally unrelated to, and do not provide self-evident support for, the broad claims suggested by the plaintiffs for class treatment.
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> Third, although the record in this case does contain a substantial amount of statistical data that could conceivably be relevant to the class certification issue, the plaintiffs have made no attmept to relate any of this material, except in the most general way, to their class certification motion. Specifically, the plaintiffs have not stated how and why the statistical data would support theories of discrimination on a class wide basis, and they have not explained its significance in terms of numerosity. In sum, the plaintiffs have not made even a minimal showing, with respect to the Rule 23(a) criteria, in support of their fifteen proposed classes."

Lane v. Bethlehem Steel, slip.op. at 5-7 (Paper No. 17, Ex. E).

When the Fourth Circuit upheld the denial of class certification in Lane, it characterized the Lane complaint as one "alleging in very broad language, thirty-seven general practices in which the defendants allegedly discriminated against black employees and applicants for employment. There were no allegations

identifying the injuries allegedly suffered by the named plaintiffs, or any of them." Adams v. Bethlehem Steel, 736 F. 2d at 994. Even after several amendments to the complaint the Lane plaintiffs "made no attempt to specify the harm allegedly suffered by any of the named plaintiffs by reason of the general practices of which they complained." Id.

When a court analyzes the notice issue to determine whether American Pipe tolling principles should apply to a new action alleging individual claims, "the appropriate focus of inquiry should be upon the extent and character of the notice of the later individual claims which the defendant actually received from the class action." Rose v. Arkansas Valley Environmental & Utility Authority, 562 F. Supp. 1180, 1193 (W.D.Mo. 1983).

In Lane, the present defendants received notice only of a generalized laundry list of "virtually every conceivable type of discriminatory practice." Lane v. Bethlehem Steel, slip.op. at 6. In effect, the defendants had notice only of the fact that they were being

charged with racial discrimination in any and all types of general employment practices.

As to the character of the notice received, the named plaintiffs in Lane did "not indicate what claims [they] intend[ed] to raise on their own behalf under either Title VII or section 1981." Id.

It is named plaintiffs' claims which define the parameters of the class claims. See, e.g., General Telephone Co. of Southwest v. Falcon, 457 U.S. 149 (1982); General Telephone Co. v. EEOC, 446 U.S. 318, 330 (1980) (discussing the typicality requirement).

As this court pointed out in Lane, "it is essential [for class action purpsoes] 'to identify the character or type (but not the merits) of each plaintiff's claim.' Such an identification is necessary because central to both disparate impact and disparate treatment theories of liability, where class wide race discrimination is alleged, 'is the existence of an identifiable employment pattern, practice, or policy that demonstrably affect all members of a class in substantially, if not completely, comparable ways.' If

such a pattern, practice or policy cannot be shown, then the named plaintiffs' individual claims are inappropriate for class treatment; they would involve either uniquely personal claims, or an event or series of events not predicated upon a company wide employment practice." Id. at 3 (citations omitted) (emphasis in original).

Because American Pipe requires the defendants to have had notice of the substantive claims against them in order for the tolling doctrine to be applicable, the claims of the named representatives of the putative class, whose suit is relied upon to toll the statute of limitations, must have been alleged sufficiently clearly to establish the specific parameters, at least arguably, of the class claims. If the named plaintiffs do not indicate what claims they intend to raise individually, there is no notice to defendants as to the substantive nature of the claims made on behalf of the individual members of the class. General Telephone Co. of Southwest v. Falcoon, supra. It follows in such a case that, if a putative class action is re-

fused certification on the basis that the individual claims of the purported class representatives are insufficiently stated to determine what the class claims are, the defendants have no notice from the filing of that putative class actions of the type of claims which individual members of the rejected class might make after the putative class if refused certification.

This court concludes that a previous class action which puts the defendants on notice that many persons have a generalized grievance of racial discrimination against them does not give the defendants the fair notice which is the foundation of the tolling doctrine announced in American Pipe. Thus when the named plaintiffs in a class action do not specify the harm they have suffered, the putative class members cannot rely on American Pipe tolling principles to protect their individual claims from a statute of limitations defense.

The facts and procedural history of the present case present the rare situation[3] in which a previous

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[3] The successful assertion that the original

class action suit did not provide notice to the defendants of the substantive claims being brought against them. But if the notice requirement of American Pipe is to have any effective application, it must be applied when class representatives make no specific allegations of injury. Denying American Pipe tolling provision protection in such a case reflects "'[t]he theory that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" American Pipe, 414 U.S. at 554 citing Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1974).

Therefore, without the aid of American Pipe tolling, the plaintiffs' claims here must have been filed within the relevant limitations periods for Title VII and § 1981.

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[3] (con't) class claims were so vague as to provide no notice "will be rare, however." Comment, supra, at 113.

B) Are the individual claims in the instant action barred by the statute of limitations?

1) Title VII Claim

Under the Title VII "a charge ... shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred ... except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a state or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). Because the State of Maryland, through the Maryland commission on Human Rights, provides a state agency capable of providing relief from discrimination, Maryland is a Title VII deferral state. Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670, 680 n.26 (D.Md. 1979).

As this court explained in Soble v. University of

Maryland, 572 F. Supp. 1509, 1514 (D.Md. 1983), Title VII requires that the charge with the EEOC may not be instituted until 60 days after commencing the state proceedings.[4] "Thus with the Act's filing deadlines, a grievant must file with a state agency within 240 days of the alleged discriminatory act."[5] Id.

Although it is unclear from the papers and pleadings on file in this case whether the plaintiffs ever filed charges with the Maryland Commission on Human Rights, for the purposes of this motion this court will assume that such filing occurred. Therefore, if the plaintiffs, filed charges with the EEOC on or before the 240th day after the alleged employment discrimination occurred, their charges were timely filed.

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[4] See 42 U.S.C. 2000e-5(c))

[5] In Soble, this court held that claimants who filed EEOC charges prior to June 23, 1980 were "entitled to the 300 day rather then the 240 day extended period for filing with the EEOC." 572 F. Supp. at 1514. The EEOC charges herein were filed in January and February, 1982 (Paper No. 17, Ex. F). Therefore, the 240 day filing requirement, not the 300 day filing requirement, applies to these plaintiffs.

A review of the EEOC charges filed by the plaintiffs herein reveals that two time periods of discrimination are alleged. The first time period runs from each plaintiff's date of employment to 1973-64. Within that period of time, each claimant alleges that Bethlehem Steel directly discriminated against him (Paper No. 17 Ex. F). Clearly, charges filed in 1982 for direct discrimination ending in 1974 are not timely.

The second time period runs from "1973-74 to date." During that time each plaintiff alleges that he was "indirectly aggrieved" by the past discriminatory practices of Bethlehem Steel, particularly in the promotion area. Each plaintiff alleges that but for those past practices he would be "much further advances at Bethlehem Steel than [he] currently [is] and would have a higher paying job." (Id.)

As to the second time period, the plaintiffs assert that Bethlehem Steel "intentionally continu[ed] the effects of its old policies 'via the indirect expedient' of not promoting its black employees to super-

visory and management positions, and by not promoting them to its craft-oriented positions, etc." (Paper No., 21 at 5) (emphasis in original). Therefore, the plaintiffs argue that Bethlehem Steel's conduct constituted continuing violations of Title VII which would toll the running of the statute of limitations.

In Soble, this court examined the recent decisions of the Fourth Circuit and the Supreme Court discussing the continuing violations theory and concluded that the teachings of those cases required district courts to examine "the facts of each case to determine whether a continuing policy of discrimination is allegedly practiced or whether the situation involves only a series of discrete decisions." 572 F. Supp. at 1515. To escape the bar of statutes of limitations, the plaintiffs must allege, and ultimately prove, that Bethlehem Steel engaged in a plan or practice of discrimination which continued substantially up to the time they filed their EEOC charges. See, e.g., id. at 1516; Small v. Bethlehem Steel Corp., No. M-82-1825 (D.Md. Jan. 10, 1983).

Each plaintiff stated in his EEOC charge:

> "I believe that I and Blacks as a Class, have been continuously discriminated against, for the following reasons: The effects of the pre 1973-74 discrimination against Black employees has an on-going and continuing effect against all Black employees in my situation, including myself and is otherwise continuing both in effect and directly, but to a lesser extent than previously against such Black employees and myself to this date."

(Paper No. 17, Ex. F). That assertion, as this court sees it, alleges only that the pre 1973-74 discriminatory acts of Bethlehem Steel continue to affect the plaintiffs. It seems that the plaintiffs are not alleging a continuing plan or practice of discrimination, but only that Bethlehem Steel's prior discriminatory practice negatively affects them today.

The critical question "in every discrimination case, whether there is a charge of 'continuing violation' or not, is 'whether any present violation exists' and not 'mere continuity'...." Hill v. AT & T Technologies, Inc., 731 F.2d 175, 180 (4th Cir. 1984). A "present violation" is one occurring within the requisite number of days, i.e. 180, 240, or 300 days, of the

filing of a charge alleging a violation of Title VII. Id.

The plaintiffs herein have not alleged present violations. They have alleged past violations with present effects. "[T]he proper focus [when computing limitations] is on the time of the discriminatory act, not the point at which the consequences of the act became painful." Chardon v. Fernandes, 454 U.S. 6, 8 (1981). See also Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982).

The discriminatory acts in this case occurred prior to 1974.[6] In United Air Lines, Inc. v. Evans, 431, U.S. 553 (1977), the Court recognized that the airlines

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[6] The plaintiffs, in their response to the Bethlehem Steel's motion to dismiss, indicate that plaintiff Aiken filed a second EEOC charge on Septeber 2, 1983 (Paper No. 21, Attachment). That charge alleges an ongoing present policy and practice of discrimination against blacks with some specificity. For example, Mr. Aiken states that because of Bethlehem Steel's policy of discrimination in promotion "it is futile to apply for positions that you know you're not going to get because of race." (Id.)

The plaintiffs contend that the 1983 EEOC charge "serves as an additional buttress to support the complaint of current (i.e., post 1975 class discrimination), as well as past discrimination (i.e., pre-1975 discrimination)."

Even if the 1983 EEOC charge, which could not have been the basis of the plaintiffs' 1982 complaint,

had engaged in a discriminatory practice in the past and that past act of discrimination had present effect - i.e., "a continuing impact on [the plaintiff's] pay and fringe benefits." Id. at 558. The Court, nevertheless, concluded that the plaintiff's claim was time-barred emphasizing that "mere continuity" does not a continuing violation make. Id. "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.... [I]t is merely an unfortunate event in history which has no present legal consequences." Id.

This Circuit has held that Evans precludes a "continuing effects" interpretation of the continuing

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[6] (con't) not have been thebasis of the plaintiffs' 1982 complaint, were relevant to this action, it is clear from the face of the charge that no present violations of Title VII were alleged to have occurred within the relevant time period prior to filing suit. The plaintiff states in the charge that "[t]here has been no position available since 1982, that I know of." (Paper No. 21, Attachment). Yet in his charge he complains of discrimination in promotion.

It is difficult to understand how one can be discriminatorily denied promotions during a time when no positions opened up into which a person could be promoted.

violations theory. See Simmons v. South Carolina State Ports Authority, 694 F.2d 63, 65 (4th Cir. 1982) (affirming lower court holding that failure to challenge timely the alleged unlawful practice precludes a challenge to its derivative effects); See also Allen v. United States Steel Corp., 665 F.2d 689, 693 (5th Cir. 1982).

In summary, the plaintiffs' 1982 EEOC charges do not assert actionable violations of Title VII within the relevant time period. Their Title VII claims are time barred.

2) Section 1981 Claims

Maryland's three year limitations period, Md. Cts. & Jud. Proc. Code Ann. § 5-101, applies to section 1981 claims. Burnett v. Grattan, ____U.S.____, 52 U.S.L.W. 4916, 4917-18, (March 26, 1984). The litigable scope of section 1981 claims is not limited by an EEOC charge. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 458-60 (1975). Therefore, this court turns to the allegations in the complaint to determine when the plaintiffs' § 1981 cause of action accrued.

Initially, the court notes that any cause of ac-

tion based solely on acts occurring prior to November 9, 1979, three years before this complaint was filed, is time barred unless the plaintiffs can show continuing violations. As stated previously, the plaintiffs must allege that a discriminatory act occurred within the limitations period, not merely that the consequences of time barred acts affect them in the present. See Chardon v. Fernandes, 454 U.S. at 8; Delaware State College v. Ricks, 449 U.S. at 257.

Therefore, to the extent that the plaintiffs' § 1981 claims are parallel to their Title VII claims, they must allege a present violation of their rights within three years of filing suit. As to the parallel claims, each plaintiff, except for minor discripancies in dates of employment and position, allege essentially the same facts. For example, plaintiff Leford T. Davis alleges that when he began to work at Bethlehem Steel in 1949 he was assigned to an all black unit. In 1962, he was transferred to a white unit, but was so harassed, he transferred, or was transferred, back to the all black unit two weeks later (Paper No. 1, ¶ 13 & 14).

Eventually, he asserts, he gave up applying for better jobs or promotions (Paper No. 1, ¶ 20). Therefore, he alleges, that each and every day, he was discriminated against by the very existence of the discriminatory practices. (Paper No. 1, ¶¶ 21-25).

It is clear from the face of the complaint that the "discriminatory practices" by which he and the other three plaintiffs were aggrieved occurred prior to 1974 (see Paper No. 1, ¶¶ 20-24). As such, he is asserting a continuing effects not a continuing violations, theory. In fact, Mr. Davis, and the three other plaintiffs herein, state in their complaint, "from the initial date of ... employment, or almost immediately concurrent with such dates, each of the named plaintiffs was aware of the discriminatory policies and practices of Bethlehem Steel and the union defendants ... and as black employees each of the named plaintiffs realized the futility of attempting to get out of the black units at Bethlehem Steel...."[7] (Paper No. 1, ¶

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[7] The court notes, however, that Mr. Aiken in 1970 "was transferred to a primarily white unit and has

20). "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." Delaware State College v. Ricks, 449 U.S. at 257.

Therefore, as to the parallel Title VII/§ 1981 claims, no present violation is alleged to have occurred within three years of filing suit. Those § 1981 claims are time barred.

The plaintiffs, however, have alleged a cause of action under § 1981 which was not encompassed in their Title VII claims. By amendment, on December 7, 1982, the plaintiffs alleged that they were "subjected by the very existence of ... [discriminatory] policies to inconvenience, unfairness, depression, isolation from and denial of association with the preferred group, humiliation and a denial of psychological well being. Each plaintiff was additionally intimidated and threatened by the very existence of the aforesaid policies

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[7] (con't) remained in this unit until this date ..." (Paper No. 1, ¶ 15) and that Mr. Smith "[i]n 1955 was placed in a racially mixed unit...." (Paper No. 1, ¶ 19).

and actions of the defendants, each and every day during the period involved; and were additionally threatened and intimidated by the very existence of the policies and actions involved as to future violations of their civil rights by the defendants in this very same regard and were as such personally aggrieved on each and every day of the period in question...." (Paper No. 5, ¶ 21).

This court reads those allegations to mean that the plaintiffs have experienced and continue to experience psychological injury becuase of the defendants' past discriminatory practices. "It may well be that the infliction of psychological injury or deprivation of interracial association is actionable.... [But] the existence of a wrong without an identifiable injury does not provide a basis for redress." Adams v. Bethlehem Steel, 736 F.2d at 994 (commenting on the plaintiffs' argument on appeal from lane that the "'mere existence' of thirty-seven enumerated policies alleged to be discriminatory had an adverse effect upon all black employees....") (citations omitted).

An "identifiable injury" causing the psychological harm must be one that is not time-barred. As stated previously, none of the plaintiffs herein have pointed to an act of discrimination which occurred within three years of their filing suit. In additions, as to plaintiffs Aiken and Smith, no deprivation of interracial association has occurred within the relevant time period. See note 7, supra. As to plaintiff Bland, he "retired from Bethlehem Steel in 1975" (Paper No. 1, ¶ 17). His cause of action for psychological injury or deprivation of interracial association, if one existed, at the latest accrued on his date of retirement. Finally, as to plainiff Davis, his transfer to a white unit in 1962 and the subsequent re-transfer back to an all black unit during that year, gave rise to a cause of action at that time,[8] if at all.

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[8] It could be argued that it was not until the Supreme Court decided Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), recognizing a cause of action for denial of interracial association that plaintiff Davis' cause of action accured. Even if that were the case, his claim brought in 1982 remains time barred.

In conclusion, the plaintiffs' § 1981 claims are time barred.

C) If the named putative class representatives' claims are not protected by tolling principles, how does that effect the putative class?

As stated previously, the claims of class representatives define the parameters of the class. Therefore, at least one member of the Lane class must be able to come forward with a "fresh" claim of sufficient specificity to represent the class. But, when in a previous class action, the named plaintiffs have not identified the claims they intend to raise individually, i.e., have not identified the parameters of the class, and when, as a result, the defendants have not received notice of potential subsequent claims, it is logically impossible that there exists a plaintiff from the previous class action who can come forward to represent the class.

An anomaly occurs in such a situation. A class may exist, but it lacks a plaintiff to represent it adequately. Each member of the putative class who is brought forward would face the argument that Lane

provided the defendants with no notice of the individual's claim.

Therefore, the putative class action brought herein is not protected from a limitations defense by American Pipe tolling.

D) If Lane does not toll the limitations period on class members claims, what is the status of this class action?

Because Lane does not toll the statutes of limitation for this class action, it must be viewed as a new class action, filed in November, 1982. Although, the named class representatives' claims have been held to be time barred, that does not necessarily effect the viability of the class action. "If the named plaintiff's claim is barred by statute of limitations, a proper plaintiff may be substituted to represent the class." Dameron v. Sinai Hospital of Baltimore, ____F. Supp. ____, No. M-83-2835 (D.Md. October 4, 1984) citing International Woodworkers v. Chesapeake Bay Plywood, 659 F.2d 1259, 1270 (4th Cir. 1981).

The plaintiffs have not moved for class certification at this time, but in order to avoid continuing

and protracted litigation regarding the viability of potential class representatives' claims and the underlying claims of the class, this court will exercise the broad administrative and adjudicative power it possesses to guide the course of this class action suit. See, e.g., Shelton v. Pargo, 582 F.2d 1298, 1306 (4th Cir. 1978); Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 274. (10th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511, 520 (6th Cir.), cert. denied, 429 U.S. 870 (1976).

In the usual case, when a court has before it a class certification motion it "generally refuse[s] to consider the impact of such affirmative defenses as the statute of limitations on the potential representative's case." International Woodworkers v. Chesapeake Bay Plywood, 659 F.2d at 1270 (4th Cir. 1981). "This view is supported by the principle that the class representative need not show a probability of individual success on the merits...." 1 H. Newburg, Class Actions, § 1115(e) at 191 (1977).

The present action is not the usual case. At

this juncture, the putative class is unrepresented by a named plaintiff. Serious issues regarding the effect of limitations on all class members claims have been raised. Litigation regarding the alleged discriminatory practices of these defendants has spanned almost fifteen years. See, e.g., Carroll v. United States Workers, et al, 498 F. Supp. 976 (D.Md.), aff'd, 639 F.2d 778 (4th Cir. 1980) (case instituted in 1975); Lane v. Bethlehem Steel, 93 F.R.D. 611 (D.Md. 1982), aff'd sub nom Adams v. Bethlehem Steel, 736 F.2d 992 (4th Cir. 1984) (instituted in 1971); Lewis v. Bethlehem Steel, 440 F. Supp. 949 (D.Md 1977) (instituted in 1970). Given those circumstances, some investigation of the merits of the putative class's claims appears warranted.

The plaintiffs define the class in their complaint,

> "as including the named plaintiffs and all similarly situated black persons who were hourly paid, blue collar employees of Bethlehem Steel, and members of Local Union 2609 or 2610 of the United Steelworkers of America, at any time during the operable period of time involved in this class action, i.e., from September 26, 1967 through the present date for Title VII purposes and from June 4, 1969 until the pre-

> sent date for § 1981 coverage, whether currently retired or not, and who refused settlement of class claims from the defendants in 1976, or who were retired prior to 1976 from Bethlehem Steel and were not tendered such a settlement."

(Paper No. 1, ¶ 7).

As stated previously, the latest date on which the statute of limitations began to run on this action filed in November, 1982, is November, 1979.[9] It appears from the above definition of the class that the class is composed totally of persons whose claims accrued in 1976, when they refused settlement of class claims or were not tendered settlement because they had retired. Because no class members can invoke American Pipe tolling, any member of the class, as it has been defined, who comes forward as a named plaintiff likely will be found to be an improper class representative. In essence, all the claims of all the class members appears to be time barred, having accrued in or before 1976. If on the other hand, the class contains persons

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[9] The November, 1979 is the lates date on which the class members' § 1981 claims accrued.

whose claims accrued on or after November, 1979, this court has serious doubt, after reading the complaint, whether a new named plaintiff will be able to state a claim. To do so, the class representative must allege a present violation of his right not to be discriminated against.

As set forth in their complaint, the class members appear to rest their cause of action against Bethlehem Steel on the allegation

> "[t]hat at all times after 1974, or after the cessation of Bethlehem Steel's direct open handed pattern and practice of assigning newly hired black workers to all black departments or units, or placing black workers generally in lower paying job classifications, etc., and while Bethlehem Steel in doing so greatly enlarged black employment opportunity in its blue collar field of employment, the company nonetheless intentionally continued the effect of its old policies of discrimination via the indirect expedient of not promoting the plaintiffs and their class to supervisory or management positions, and in particular, by not promoting them to its craft-oriented positions on an equal basis with white employees, in violation of 42 U.S.C. § 1981 and § 2000e, et seq., and has done so until this date."

(Paper No. 1, ¶ 9(6)) (emphasis added). Their allegation against the unions is that the unions encouraged the

company's discriminatory practices (Paper No. 1, ¶ 10(1)-(5) and that

> "the union defendants herein by failing to act against the above discriminatory actions of the company, under the circumstances, thereby ratified such discriminatory policies, in violation of 42 U.S.C. § 1981 and of Title VII."

(Paper No. 1, ¶ 10(6)).

The continuing effects of past discrimination is not actionable unless a present violation exists. The complaint, on its face, alleges only the continuing effects of past discrimination. As such it leads this court to believe that the continuing violations theory cannot be applied to prevent the barring of any and all class members' claims by limitations.

If, in fact, every member of the putative class herein possesses an apparently, time barred claim which cannot be saved by the continuing violations theory, it would be a waste of judicial time and resources to allow new class representatives to be substituted for the named plaintiffs herein, and to allow the new class representatives to seek certifica-

tion of the class, only to determine ultimately that the class representatives and the class they seek to represent possess solely stale claims.

Class actions are a powerful means to correct discriminatory practices, but "Title VII class actions, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982). As the Supreme Court "noted in Coopers & Lybrand v. Livesay, 437 U.S. 463, 'the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Id. at 160.

The statue of limitations issue is enmeshed in the class certification issue in this case.

Therefore, mindful of this court's responsibility to oversee and administer a class action and cognizant of the principles underlying statutes of limitations, this court concludes that absent a showing that a class exists containing sufficient members to pursue "fresh"

claims, the defendants' motions for summary judgment on the gounds of statutes of limitation will be granted.

Plaintiffs' counsel is directed to:

1) Identify for the court one or more unnamed class members who will seek leave to be substituted in this action as class representatives.

2) Prepare, with the proposed class representatives, answers to the following questions to be submitted in the form of an affidavit:

a) Does the class you will seek to represent contain members other than those who refused settlement of their present claims in 1976 or those who retired prior to 1976 who were not offered a settlement?

b) If so, how many members do you estimate belong to the class?

c) What individual claims do you seek to bring on your own behalf and on behalf of the class?

Answers to these questions will aid the court in determining whether a class exists and, if so, its parameters.

Accordingly, it is this 3rd day of January, 1985, by the United States District Court for the District of Maryland, ORDERED:

1) That the defendants are granted summary judgment on the named plaintiffs' individual claims of discrimination on the grounds of the applicable statutes of limitation.

2) That a final decision on the defendants' motions for summary judgment on the class claims will be held in abeyance subject to receipt by this court on or before January 30, 1985 of the information requested herein of the class and its counsel.

3) That failure to provide this court with sufficient information to determine the existence of a class and its parameters by January 30, 1985 will lead to the entry of judgment in favor of the defendants herein.

4. That the Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

James R. Miller, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LEFORD T. DAVIS, et al.	*	
	*	Civil Action
v.		
	*	No.: M-82-3255
BETHLEHEM STEEL CORPORATION, et al.	*	

ORDER

On January 3, 1985, in a Memorandum and Order, this court provided the plaintiffs with an opportunity to clarify the parameters of the individual and class claims brought in the instant action. In that memorandum, the court decided that the claims as presented in the original and amended complaints appeared time barred but, because of the vagueness of the complaints, requested additional information from the plaintiffs.

By letter of January 14, 1985, the plaintiffs informed the court that they "elected not to pursue any 'fresh' claims . . . or to submit new class plaintiffs."

Accordingly, it is this 21st day of January, 1985, by the United States District Court for the District of Maryland, ORDERED:

1. That defendants' motions for summary judgment be, and the same are hereby, GRANTED.

2. That the Clerk enter a judgment in favor of the defendants herein.

3. That the Clerk mail a copy of this Order to counsel for the parties.

James R. Miller, Jr.
United States District Judge

APPLICABLE STATUTES

42 U.S.C. §2000e-5(f)(1), provides in pertinent part as follows:

> (f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge .... If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political sub-division, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be

> brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charges was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice....

42 U.S.C. § 1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.